

Amherst Zoning Board
Tuesday January 20, 2015

Attendees: D. Kirkwood; Chair, J. Taggart, J. Quinn, R. Rowe, J. Ramsay, W. Sullivan (Alt), R. Panasiti (Alt), C. Vars (Alt) and C. Mailloux- Community Development Director

J. Taggart called the meeting to order at 7:09pm, introduced the board members and explained the ZBA process. D. Kirkwood joined the meeting later.

New Business:

1. Case #PZ5758 – Variance

Safeguard Self Storage, LLC (Owner), 6 Caldwell Drive, PIN# 002-046-005, Zoned Industrial – Request for a variance from Section 4.9 of the Zoning Ordinance to allow a portion of the existing storage facility to be used for a residence for the facility manager/security agent.

M. Hollis Attny, presented for the applicant. Edward Smith – principal of the company was also present. The self-storage office area is approximately 2400 sq. ft. and has been used by the storage company and a moving company. The 24/7 demand for an on-site person is getting more and more frequent. One solution is to have an on-site residence. This property is zoned industrial and residences are not allowed. The Amherst ordinance doesn't distinguish between a primary use or an accessory use, but the situation here is that it would be an accessory use. They are asking for 785 sq. ft. of space for residential use.

Attny Hollis addressed the tests:

1. Generally it's not good planning to have industrial and residential properties together due to noise and traffic. In this case, the public interest will be served because it will limit cars /traffic coming and going and help with security on the premises and in the area.
2. This proposal will not be contrary to the health, safety or welfare of the public or change the character of the neighborhood.
3. There is a long standing use of property that fits the zone, but now the use requires occupancy/ personnel on site all the time. Granting the variance allows the use to continue without substantial expenditure to the company to hire 24 hr/day personnel. There will be no harm to the community – no change in building structure or traffic pattern.
4. The values of surrounding properties will not be affected. The change will not even be noticed unless you're inside the storage/ office space. There will be no change in the use of the storage facility. The benefit to the public is to have a 24/7 residence in the neighborhood for added security.
5. There is nothing unique about this industrial property. The uniqueness is the use of the facility. The actual use of the building creates the hardship. Prohibiting a residence here does not preserve the value of neighboring properties, nor diminish the value of this property. It is a fair and reasonable use for this property.

The Board asked questions of the applicant.

C. Vars asked a floor plan question. Mr. Smith explained that the current space is all office space and they wish to renovate a portion of it into the living space. They further clarified that the entrance to the apartment comes from an internal hallway of the building.

R. Rowe asked of the requested 785 sq. ft., how many storage units could fit in that space? 8-15

W. Sullivan asked who would this space be rented to- a family where one spouse is the mgr. or one single person? Mr. Smith clarified that the apartment would not be advertised. It would be an employee of the company that lived there for security and fast response as needed. It would not be restricted to people with or without families. But it would be restricted to the manager of the facility.

R. Panasiti asked some fire safety questions about sprinklers. If the property becomes a residence, the fire safety requirements would have to be met.

C. Mailloux clarified that when they go for a permit, the fire department will have codes for them to follow.

Mr. Smith explained that the rooms already exist, but he will need to do some plumbing and maybe frame a closet.

R. Rowe mentioned it is a large building/ buildings – about 60,000 sq. ft. that needs security. There were no comments or questions from the public.

D. Kirkwood arrived at this time.

He stated that W. Sullivan will vote for J. Ramsay for the next case as J. Ramsay has recused himself.

2. Case #PZ5757 – Variance

Arboleda Realty, LLC (Owner), LaBelle Winery, LLC (Applicant), 345 Route 101, PIN# 008-057-000, Zoned Residential/Rural – Request for a variance from Section 4.3 of the Zoning Ordinance to allow the operation of a restaurant within the existing winery facility.

M. Hollis, Attny presented for the applicant. Amy LaBelle, owner, was also present.

Background: In 2011 they received a variance to operate the winery: manufacturing, retail, accompanying food and catering. The winery was new territory for Ms. Labelle and for the town. They tried to envision all of the components the winery would need and include them in the plans. The ZBA determined that a hardship existed on the property and the variance was granted.

The plans moved to the planning board. A conceptual floor plan was submitted. It was different than the one that was submitted to the ZBA in this way: the corner labeled “tasting area” in the plan presented to the ZBA was labeled “café” in the plan presented to the Planning Board. At the planning board presentations, it was discussed to have food at the facility. Plans were approved based on that.

Today, we are here because in October of 2014 Ms. LaBelle received a letter from C. Mailloux saying that after investigation, the full restaurant exceeds the scope of the approval and has not been authorized.

The ‘accompanying food’ has become an important factor to the winery. Food and wine go together. They have found that the best way to build a market for their wine is to match the wine with food and let people try it. The cash flow required to run the facility is huge. The winery has become a large scaled operation. A restaurant is a draw that will bring people in. The applicant is not asking to be a standalone restaurant, but asking to be a bistro/ café/ full -time food operation within the winery.

This letter Ms. LaBelle received in October was the first she had heard anything from the town in all this time since she has been open.

At this point the applicant can contest this ruling or ask for a variance. The complaint is that what the winery has now is not what they requested a variance for. When Ms. Labelle learned that the complaint was initiated by a member of the ZBA, she decided to come back before the ZBA. If the board members think that the winery has gone beyond their scope, the applicant wants to make an argument because that was never her intention. October 3rd is the first time anyone went to the applicant to tell her she may be operating beyond her scope. Prior to that, she did not know she was operating illegally.

M. Hollis began his argument:

The ZBA previously found that the property was unique and the proposed use was reasonable and not contrary to the public interest and would have no effect on surrounding properties. M. Hollis will address tests 1-4 regarding the variance for the restaurant, but the hardship has already been found by the ZBA.

To clarify, the applicant is asking for a variance for a full operating restaurant within the operations of the winery-not for a restaurant without the winery. It has to be incidental and it has to be part of the winery.

No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property. The ordinance is clear- to keep uses separate. No commercial such as a restaurant should be in this zone. However, because the ZBA previously found there was no fair and substantial relationship between the purpose and the application of the property and found the winery use reasonable, we would argue that putting a full restaurant within that winery rather than 'tastings with accompanying food and catering function' means there is no fair and substantial relationship between the purpose of the ordinance and this particular building and use.

Is this use a reasonable one- to have a restaurant in the winery at that location? It has always operated as a cafe. That area has always been a café whether this board understood that or not. It was clearly part of the planning board plans and was permitted and approved. The then administrators decided it was permitted under the variance. It has always operated as some sort of café. No one tried to be sneaky about it. Now, we are trying to get from this board what will satisfy the objection of the administrator. The slight change is from the activity of providing accompanying food to a wine operation to a full restaurant. With 'accompanying food' one is having wine and may or may not have food such as snacks or dinner. With a full restaurant, people could come in for dinner and not necessarily have any wine. Permitted use with accompanying food is that if you are going to eat there, you have to be drinking wine. That doesn't make any sense for the applicant or for the town. We think that a restaurant within the winery is a reasonable use of the property. Food is integral to the wine operation. We've now discovered what a winery is in this day and age: a winery makes the wine, bottles the wine, ships the wine, grows the wine and has wine events.

M. Hollis addressed the tests:

1. The proposed use will not be contrary to the public interest. LaBelle winery is a destination site. People come to see wine making, come for events, and come to eat. Parking and accessibility are not issues. The Planning board approved the plan with the café in the plans. The café will not alter the character of the neighborhood because the exterior will not change. It is not a threat to health, safety or welfare because it has all of the permits required.
2. Granting the variance will be in the spirit of the ordinance. They are not asking for a stand-alone restaurant on the property. The surrounding properties are a farm, a camp and a sledding hill. This is not going to interfere or be in conflict with those uses. There will be no adding on to the facility.

J. Taggart asked about the farm across the street and what if they wanted to be a restaurant-farm to table. M. Hollis can't make that judgment. Each property is unique.

R. Rowe said M. Hollis mentioned that the ZBA approved a plan and the Planning Board granted additional uses and the building permit from the administrator allowed the restaurant. (M. Hollis denied that he said any of that) If the zoning administrator made a mistake, NH law doesn't give justification to allow the applicant to go forward on that basis. That's his understanding. M. Hollis agreed but stated that he doesn't believe any mistake was made. The applicant didn't try to hide anything as they went through the process.

Ms. LaBelle stated that the winery has been operating since it opened under the variance that allows food, catering and winery. She believes she is operating within the variance. She is present in good faith to make sure that everyone is on the same page and the ZBA will issue a full restaurant variance.

J. Quinn stated that he was the one who initiated this process. He had nothing against the winery or the restaurant. He started investigating it because he saw the sign outside that said bistro. At the time of the

original variance request, he was an alternate, but was present at the meeting and didn't remember anything about the bistro being mentioned, so he wanted to clarify what was going on.

D. Kirkwood brought the focus back to the application at hand.

M. Hollis stated that this issue was investigated by the (then) town administrator and found to be ok.

Ms. LaBelle was never made aware of the investigation. It was then investigated again after the results were found unsatisfactory. Ms. LaBelle didn't know about that second investigation either.

J. Taggart stated for the record that from the initial application for variance until now, there have been four different zoning administrators in the office. (Charlie Tiedemann, Sarah Marchant, an interim administrator and Colleen Mailloux.)

(4.) Will the value of surrounding properties be diminished? Changing the food to full time will not change the exterior or operation of the winery. M. Hollis read a letter from Keller Williams realty. (See attached)

(3.) Will substantial justice be done?

If denied, the impact to the owner will be huge. Without the restaurant, the operation will not be financially sound. In fact, they may not be able to run the business. Also, policing whether or not the customers are having food with or without the accompanying wine is a difficult task.

The board asked some questions:

J. Quinn stated it's a catch 22 because the ZBA made their decision based on what M. Hollis presented at the time, but he didn't say everything he should have said at the time so it's a circle.

M. Hollis accepts that. And he has argued all of the four points with regards to the restaurant, but the hardship remains with the property because it has already been determined that the property is unique.

J. Quinn reviewed past minutes and what M. Hollis said regarding an event center. He looked into the procedure regarding the planning board and the permitting.

W. Sullivan stated what if we had said no to a restaurant with the first variance and now they were back to ask for one again: he asked about proper use/ what's a hardship. Is it that the ZBA gave you hardship use with the first variance and doesn't need to give a second hardship use, or is it that you have to meet the criteria of the hardship? M. Hollis replied that the old way was that if you were given reasonable use then you have it. That is not the way now. The new way is to meet criteria 1-3. First you meet 1 then 2 then 3. Unique- fair and substantial- reasonable use.

R. Rowe said his understanding is the fact that someone has a facility under a variance and can't make money and then comes back for a new variance for a new use to make more money isn't a hardship.

That was under the old rule. (self- imposed) The difference now it's the concept of reasonableness.

M. Hollis agreed with R. Rowe's explanation.

Public:

Steve Kolocotronis 12 Mt Vernon

This is the type of place the town needs. It's tasteful and understated. It's a place for the town to congregate, socialize, eat, and drink. It doesn't strike me as prudent to have a facility that invites people in to have a drink and not allow them to have food. Especially to then drive after the drinks.

R. Panasiti asked Ms. LaBelle when she applied for a license; did she have to get a liquor license?

She replied that she has two licenses:

1. to produce/ manufacture the wine. That's federal and allows for the tasting/ sampling.
2. Full bar/ restaurant/ food service license which includes the liquor license.

R. Panasiti further asked if a restaurant is needed to have the liquor license. Ms. LaBelle said the requirement is that a certain amount of food needs to be sold in order to maintain the liquor license. There is a food sales threshold that has to be met. The board asked if the food includes the catered food and it does. Does she do enough special events to maintain the liquor license?

She stated it is possible, but she hasn't researched if the catering food sales would be enough to meet the threshold.

J. Taggart asked if she can she give away wine.

Yes, in a few capacities: 1. Bottles are shipped out for charities. 2. Samples to customers before they buy (1oz) 3. Tastings (guided for small fee)

J. Taggart what sort of bar is she proposing? What will be offered?

A full bar is offered. The beers are artisan, local craft beers- bottled. The wines are LaBelle wines. And there is a full bar of high end liquors only.

J. Taggart asked C. Mailloux under the current variance, what level of food service is considered ok.

C. Mailloux responded kitchen use for events/ functions, small foods for the wine tastings, but not a full restaurant. J. Taggart asked what would be the process that the town would go through if this were a new business starting from scratch now?

C. Mailloux would recommend the applicant include the word 'restaurant' on the application. The reasonableness would be determined by the administrator.

R. Panasiti asked if the kitchen had correct ventilation and met all codes for a full kitchen. Yes.

D. Kirkwood followed-up by stating that the state enforces the public health codes and has the ability to shut a restaurant down if needed due to public health and safety.

C. Mailloux confirmed that there are food service codes. Amherst doesn't handle restaurants. That is all handled by the state for Amherst.

C. Vars moved and J. Quinn seconded to go into deliberations. Vote: all in favor

DELIBERATIONS:

1. Case #PZ5758 – Variance

Safeguard Self Storage, LLC (Owner), 6 Caldwell Drive, PIN# 002-046-005, Zoned Industrial – Request for a variance from Section 4.9 of the Zoning Ordinance to allow a portion of the existing storage facility to be used for a residence for the facility manager/security agent.

D. Kirkwood stated that J. Ramsay is voting in this case.

Voting: J. Ramsay, J. Quinn, J. Taggart, R. Rowe and W. Sullivan (for D. Kirkwood).

Discussion:

R. Panasiti asked if other businesses in that area run 24 hours. Some were mentioned.

J. Quinn can attest that there is vandalism in that area.

J. Ramsay thought the same thing- storage units would be ripe for vandalism.

W. Sullivan stated the request is a reasonable one.

R. Rowe sees it differently. Considering the size, security is needed. But what type?

J. Ramsay falls between. As the owner I would feel most secure if someone was there to respond immediately. The scope of the resident would go beyond a security guard to also assist customers.

R. Rowe stated one solution doesn't require a variance and the other does. Security guards working in three shifts can do the job.

J. Taggart is familiar with this type of arrangement. The circumstances being offered as a residence are a limiting condition. There are no windows and it's inside a storage area.

C. Vars thinks it's a reasonable request.

R. Rowe moved no regional impact. J. Ramsay seconded. Vote: all in favor.

1. The Variance will not be contrary to the public interest.

W. Sullivan yes. No threat to health, safety and welfare. The residential use within the industrial district does not conflict with the general purpose of the ordinance

R. Rowe yes

J. Ramsay it may actually be in the public interest if someone is there to deter vandalism

J. Quinn agree with W. Sullivan and J. Ramsay

J. Taggart true

5 True

2. The Variance is consistent with the spirit and intent of the Ordinance.

R. Rowe yes the facility is totally inside the building and won't be noticeable or set precedence

J. Ramsay it is in the spirit of the ordinance and the applicant is going about it in the right way

J. Quinn yes won't alter the character

W. Sullivan yes

J. Taggart true

5 True

3. Substantial justice is done.

J. Ramsay yes

J. Quinn yes reasonable use

W. Sullivan yes no harm to the public

R. Rowe no the benefit is to the applicant. It's not a place for children and there could be school expenses to the town.

J. Taggart agrees that Bob has a good point, but will vote true. Doesn't feel the threat of the gain to the applicant by harming the public. Services for children are not part of the application.

4 True 1 Not True

4. The values of the surrounding properties will not be diminished.

J. Quinn yes

W. Sullivan yes, there's no question

R. Rowe yes

J. Ramsay yes no change to property

J. Taggart true

5 True

5. Literal enforcement of the provisions of the Ordinance would result an unnecessary hardship.

J. Ramsay proposed use is reasonable. (Does not vote at this time.)

W. Sullivan yes no fair and substantial relationship

R. Rowe no there are a lot of industrial plants that use security guards. This one is no different.

J. Ramsay yes. Generally zoning ordinance split of residential from industrial is for the health, safety and welfare of the people. This is doing nothing contrary to that.

J. Quinn yes reasonable use

J. Taggart true the purpose of the ordinance is to keep residential out of industrial (for safety) but that would be specifically relating to multifamily. In this case it's almost a necessity to the facility to have a residence there.

4 True 1 Not True

J. Taggart stated that having passed all of the tests, the request for variance is granted.

2. Case #PZ5757 – Variance

Arboleda Realty, LLC (Owner), LaBelle Winery, LLC (Applicant), 345 Route 101, PIN# 008-057-000, Zoned Residential/Rural – Request for a variance from Section 4.3 of the Zoning Ordinance to allow the operation of a restaurant within the existing winery facility.

R. Rowe moved and J. Taggart seconded no regional impact. Vote: all in favor

Voting: W. Sullivan will vote for J. Ramsay

Discussion:

J. Taggart was confused by much of the testimony. He would have liked to see it as an application for a restaurant, which it is. A lot of past topics were brought up rather than staying focused on the current application.

D. Kirkwood agreed discussions were away from the application at hand.

W. Sullivan sees this as a whole new case because last time he voted; there wasn't a restaurant as part of the variance.

Does the hardship stay for the use?

R. Rowe the town has acquired land on 101 to maintain rural/ agricultural. LaBelle has done a great job with the property. It looks great and the grapes are agricultural. He is troubled that they are saying now that they can't make it without a restaurant. What kind of restaurant will it be? Breakfast, lunch, dinner, nightclub? Lights/ parking/ traffic? I want them to succeed- the facility is great, but a restaurant changes the character of the area.

J. Quinn at the last ZBA meeting we agonized over the language with regards to advertising. On another ruling we limited the number and size of tractors that could be sold. A restaurant has much more traffic than a winery would. We need to be consistent with our rulings.

D. Kirkwood stated we have to be careful with our decisions. We don't set precedent. Each case is unique.

W. Sullivan said you're point is well taken Jim, but it's not agriculture use vs. restaurant use. We approved an industrial use. If someone makes flash frozen peas, they're bringing in trucks and freezers and they're not agricultural, they are industrial.

D. Kirkwood in the government it's a manufacturing facility.

W. Sullivan yes, I've never viewed this property as an agricultural use.

J. Taggart it is kind of like maple syrup. Is it manufacturing or agricultural? The application is for a restaurant within this winery where they make, sell and taste wine. The restaurant is proposing the introduction of hard liquor. The resident brought up the issue of serving wine without food- what about having hard liquor in an agricultural area on Rt. 101?

D. Kirkwood there's another winery over by Durham- Flagg Hill. I've watched them grow. They now have tours, food, tastings and I suspect the volume of product that's produced has a threshold. Food would be in support of wine tastings and that's what I thought the first time. I could also see a restaurant would support the winery since they will only sell LaBelle wines. I don't see how there would be much more traffic than there is now.

R. Rowe a restaurant can be anything from a breakfast bar to a nightclub. We don't know anything about what type, how many people it can hold, what is the signage/ lighting. A restaurant is totally different than a winery with tastings and food pairings. It will change the character of Rt. 101.

D. Kirkwood stated the ZBA can define it.

W. Sullivan we can table the case and ask for more specifics. I didn't envision this when we initially voted, but I'm willing to separate from that and move forward with the application.

J. Quinn expressed concerns about traffic issues.

2. Case #PZ5757 – Variance

Arboleda Realty, LLC (Owner), LaBelle Winery, LLC (Applicant), 345 Route 101, PIN# 008-057-000, Zoned Residential/Rural – Request for a variance from Section 4.3 of the Zoning Ordinance to allow the operation of a restaurant within the existing winery facility.

1. The Variance will not be contrary to the public interest.

R. Rowe no initially the grapes and building as a winery are high quality, but not as a restaurant with additional lights/ signage

W. Sullivan yes not contrary

J. Quinn no will have an impact on public safety with truck traffic and more patrons

J. Taggart not true the broad description is not consistent with public interest in the residential zone.

D. Kirkwood traffic is already there. No adverse impact to date. Restaurant will not cause huge traffic true

2 True 3 Not True

2. The Variance is consistent with the spirit and intent of the Ordinance.

J. Taggart not true current use as winery and vineyard does maintain the spirit of mixed agricultural use, but a restaurant will not.

J. Quinn no the goal is to maintain agricultural and rural character

W. Sullivan yes granted before as industrial use

R. Rowe no restaurant is a whole new business. The town spent money to keep that area green and LaBelle has done well so far, but no

D. Kirkwood the spirit of the ordinance is observed. No huge change in character. Don't think increased traffic by expanded food would be an issue.

2 True 3 Not True

3. Substantial justice is done.

R. Rowe greater harm to the public good by having a restaurant and not mixed agricultural. Benefit is for the applicant.

W. Sullivan yes huge benefit to applicant, no harm to the public

J. Quinn no the applicant should have known the costs to run the winery beforehand.

J. Taggart not true

D. Kirkwood the benefit to the applicant is real, but there is additional benefit to the town in terms of enjoyment of the products the winery produces. It's a balance tilted toward the applicant but not sufficient to harm the public.

2 True 3 Not True

4. The values of the surrounding properties will not be diminished.

J. Quinn the proposed use would have an effect. No

J. Taggart true evidence was presented from a professional and there's no evidence against it.

R. Rowe not true adequate particulars were not given. The term restaurant is vague.

W. Sullivan true

D. Kirkwood there's no evidence that surrounding values would be diminished and the real estate letter said they wouldn't. true

3 True 2 Not True

5. Literal enforcement of the provisions of the Ordinance would result an unnecessary hardship.

W. Sullivan true a restaurant use in this area is reasonable. Fair and substantial relationship- it's ridiculous that this zone is residential/ agricultural.

J. Taggart not true. There's a lot of testimony here. This board ruled that there's a hardship. Is it a physical one, or that the facility is a winery and it needs food to succeed? A restaurant in a winery is a reasonable use, but a restaurant in this zone is not a reasonable use. A hardship for the winery does not mean there's a hardship for a restaurant.

D. Kirkwood true the hardship is on the land, not the reasonableness of the use which is proposed for that land. If we acknowledged that there was a hardship the first time around, it's an expansion of an existing use within the winery itself- no additional buildings/ change in layout. Not sure how much of an expanse it will really be from what we're already experiencing. If it was a separate building, all bets are off. Given what we were told in the testimony, that it's a fairly natural pairing to have food and wine, it's a reasonable use.

R. Rowe the applicant came before us and we said the property was unique for a winery. Now they want a different use. What if in the future they want to get rid of the winery and keep the restaurant? The hardship is self-imposed.

D. Kirkwood stated that there was no testimony that stated the use would change.

J. Quinn no. No unnecessary hardship exists to run the restaurant. Changing the occasional catering to a full-time restaurant is too big of a change.

2 True 3 Not True.

D. Kirkwood stated that having passed only one of the tests, the request for variance is denied.

J. Taggart moved and R. Rowe seconded to come out of deliberations. Vote: all in favor

J. Quinn had some thoughts and questions as to what the ZBA is allowed to do as a board.

C. Mailloux reiterated that this board has no enforcement capabilities. As a citizen/ resident a board member can document and bring issues to the administrator. The board cannot have any discussions other than about applications at open meetings.

The board discussed the next steps the applicant could and may take.

Old Business:

Minutes of December 16, 2014

Minutes deferred.

J. Taggart moved to adjourn at 10:20pm. R. Rowe seconded. Vote: all in favor

Respectfully submitted,

Jessica Marchant